No. 85-656

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1985

SECRETARY OF STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Appellant.

v.

SOCIALIST WORKERS PARTY, ET AL.

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF APPELLANT

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September, 1986

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83pp

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Argument

INTRODUCTION AND SUMMARY

The arguments of the Socialist Workers Party (hereinafter "SWP") sift down to three major interrelated contentions; (1) That the strict scrutiny standard, not the rational basis standard, should apply in evaluating Washington's 1% requirement for a minor party candidate to move from the state September primary election to the November general election ballot; (2) That the State must

show a *compelling need* for this 1% requirement; and (3) That the 1% requirement has resulted in minor parties generally not reaching the general election ballot for statewide offices, and that such a result renders that requirement invalid as applied to those offices.

We take up each of these contentions in turn.

1. We first show that under this Court's decisions, the strict scrutiny standard is not applicable in a case such as this. For the 1% requirement is no more than Washington's effort to exercise a right which this Court has recognized many times and which it most recently described as follows:

> The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates. *Jenness v. Fortson*, 403 U.S. 431 (1971); *American Party of Texas v. White*, 415 U.S. 767.

Anderson v. Celebrezze, 460 U.S. 780, at 788, n. 9 (1983).

Neither *Jenness v. Fortson*, 403 U.S. 431 (1971), nor *American Party of Texas v. White*, 415 U.S. 767 (1974), applied the strict scrutiny test; and for good reason. Although those cases, as does this case, involved the election process, they in no way involved situations in which a State denied any of its citizens the franchise or diluted the effect of their vote. Rather, those cases involved, again as here, a State's effort to require a "preliminary showing of substantial support in order to qualify for a place on the ballot." If a state system involves denial of a voter's franchise or dilution of his or her vote, strict scrutiny is appropriate; but not when the system simply requires a preliminary showing of substantial support which reduces the number of candidates on the final election ballot.

For reasonable minds will differ as to what amount of support is "substantial," at what point a multiplicity of candidates who have virtually no chance of election be-

comes "wasteful" or "confusing," and where and how the line should be drawn between "frivolous" and "non-frivolous" candidates. *Anderson, supra.* These are all highly debatable matters.

Not surprisingly, States will differ in where they draw the lines and thus resolve the debate. There should thus be a wide range within which the judgments of the States will pass constitutional muster, and within which the strict scrutiny standard will be inapplicable. Beyond that range, strict scrutiny may well be appropriate, as in *Williams v. Rhodes*, 393 U.S. 23 (1968). *Jenness* and *Williams* together tell us roughly where that range is; and Washington is well within it.

2. Washington itself, in 1977, changed the lines which it had previously drawn. Indeed, before 1977, it had, for all practical purposes, no requirement at all of a showing of "substantial" support in order for a party to place its candidate on the ballot. The prior Washington requirement for a minor party nominating convention of 100 voters or ten from each congressional district is hardly "substantial" in any meaningful sense, even when — as was the case before 1977 but not after — those voters attending the convention on primary election day had to forego the opportunity to vote in the primary.

This previous liberality to be sure, cannot be proven to have put the whole election system in serious jeopardy. Rather, the legislature appears to have simply decided that such broad permissiveness was potentially "wasteful," "confusing," and encouraged "frivolous" candidates; it therefore decided to require some "substantial" showing of support. Washington decided, in short to exercise the right which other States had been exercising, as shown in *Jenness* and *American Party*, but which Washington had previously foregone. And Washington is not required to show a compelling need in order to begin to assert that right.

3. The success of minor party candidates under the 1977 change differs markedly for statewide positions, such as U.S. Senator or Governor, and non-statewide positions,

such as U.S. Representative, positions in the state legislature, and local government offices. Statewide, the minor party successes have been few; non-statewide, the failures have been few, if any. In claimed recognition of this difference, the court below invalidated the 1% requirement only as applied to statewide positions, despite the fact that the complaint had requested that it be invalidated *in toto*. Just as the SWP would prefer to avoid any consideration of these non-statewide results for minor parties, so too it would avoid consideration of another group subject to the 1% requirement, viz., independent candidates for statewide office.

For the difference in results under the 1977 change in statewide elections for minor party candidates on the one hand and for independent candidates on the other is likewise striking. Of the five independent candidates who have run for statewide office since 1977, four have met the 1% requirement and gone on to the general election. Note: under Washington law, the process for "Independents" is the same as that for minor parties.

The SWP would have the Court disregard these non-statewide results for minor parties and statewide results for independents as irrelevant. However, the races are indeed relevant; for they confirm that with reasonable diligence and effort, and with reasonably attractive candidates, the 1% requirement *can* be met. The differences in results should not be laid to the 1% requirement, which is completely uniform in its application — a uniformity which the lower court has destroyed. Rather, the difference should be laid to the obvious source of the difficulty, i.e., the failure of the minor parties to expend the efforts on candidacies at the state-wide level that they apparently do at the non-statewide level.

It is not unreasonable to expect that minor parties may tend to have their base of support localized. The SWP, for example, may have its base of support in our industrial areas, such as the Seattle-Tacoma area, rather than in the agricultural communities of eastern Washington. While this may be a factor in the differing results, it simply means that a minor party must, in order to meet the 1% requirement statewide, either exploit its local base more effectively, or expand it to other areas. It should not mean that the State must abandon a uniform standard in order to make up for a party's failure to do either.

I

THE STRICT SCRUTINY STANDARD SHOULD NOT BE APPLIED IN THIS CASE

This case involves, all would agree, the rights of a candidate to ballot access, and the concomitant rights of citizens to vote for that candidate and to associate for the advancement of their political beliefs by supporting that candidate. The SWP argues, however, that this agreed starting point necessarily triggers the application of the strict scrutiny standard in this case. (See SWP Br. 19-24).

This argument is entirely too simplistic, and has been rejected by this Court. See State Br. p. 14-15, discussing *Bullock v. Carter*, 405 U.S. 134, 142-143 (1972), which explicitly recognizes that under *Jenness v. Fortson*, 403 U.S. 431 (1971), ballot access requirements do not automatically trigger the strict scrutiny test. See also, *Clements v. Fashing*, 457 U.S. 957, 963-965 (1982), (Opinion of Justice Rehnquist).

Because of the central importance which this question of the proper standard of review has assumed in the SWP's argument, we would make some additional comments.

The right to vote implicated here "* * * differs radically from the right to vote that underlay the reapportionment and franchise cases." Tribe, American Constitutional Law, 779 (1978). When a citizen is denied the right to vote, or the right to cast a vote that has the same weight as any other vote, strict scrutiny is obviously appropriate. But we are not dealing with that sort of law here. As explicitly recognized in *Bullock*, this difference is critical in

determining the standard of review. See *Bullock, supra,* 405 U.S. at 142, 143, quoted at State Br. 14, 15.

This is not to suggest that strict scrutiny is *never* appropriate in a ballot access case; for such a suggestion would embody the same simplistic approach as does the argument of the SWP on this issue. As shown by *Williams v. Rhodes,* 393 U.S. 23 (1968), a State's restrictions may go so far beyond the range of reasonableness that strict scrutiny is appropriately invoked.

And this is precisely the point, we suggest, which the Court had in mind in *Bullock* when it stated:

> "The existence of such barriers does not of itself compel close scrutiny. Compare *Jenness v. Fortson* * * * with *Williams v. Rhodes.* * * * In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Bullock,* 405 U.S. at 143.

The extent and nature of the impact on the voters will thus have a critical bearing on the standard of review to be chosen. In making that choice, realism requires taking into account the uncertainties which a State necessarily faces when it exercises its right to impose ballot access requirements, and the same uncertainties which this Court faces in reviewing such requirements.

> The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates. *Jenness v. Fortson,* 403 U.S. 431 (1971); *American Party of Texas v. White,* 415 U.S. 767."

Anderson v. Celebrezze, 460 U.S. 780 at 788, n. 9 (1983).

How and where is the State to draw a line between "frivolous" and "serious" candidates or parties? It must do so, realistically by some numerical measure of "substantial support."[1] But what should that precise measure be? And

[1]The SWP, it should be noted, declares that it is not "frivolous," because it has been "a nationally organized, serious political party for over forty years." (SWP Br. 1). While we do not doubt that the SWP has a long history, and is intensely serious about its goals and principles, a State can measure "seriousness" only by some uniform numerical measure of support. The State will encounter obvious constitutional problems if qualitative and subjective, rather than objective numerical criteria are used to determine which parties are "serious" and which are not.

would it be better cast in terms of support in previous elections, as here? Or in terms of voter petitions, as in *Jenness*?

Attempting to answer these questions, the only thing one knows for certain is that, at some point, clutter can be excessive, and that the multiplicity of candidates becomes "wasteful" and "confusing," and presents the risk of impairing, to some extent, the voting process. Precisely where that point is, however, and the extent of impairment of the process at any given point, is unknown and probably unknowable — and certainly perpetually debatable.

A State must answer these questions and define some point, nevertheless. The "best" answers and the "best" point are impossible to determine. Identical systems may produce different results in different States; and the same system may produce different results in the same State in different years.

Uncertainties of this sort counsel, we suggest great deference by the judiciary in allowing the state legislatures to develop electoral systems and to draw the necessary lines as they find appropriate. Yet the SWP, by invoking the strict scrutiny standard, would have the judiciary engage in a "fine tuning" of the States' systems in the quest for a better or "less restrictive" system. The practical results of such an ongoing review of election standards can only be guessed at. This Court should decline the invitation.

A critical question remains. Does Washington's 1% requirement present a case, such as *Williams, v. Rhodes, supra,* in which strict scrutiny was proper? A brief comparison of the Ohio system involved in *Williams* and Washington's system involved here provides the answer.

Ohio law required nominating petitions equal to 15% of the gubernatorial vote in the previous election, which in 1968, the year in question, amounted to 433,100. The American Independent Party obtained more than that number during the first six months of 1968. However, the deadline for filing the petitions was February 7. There were also very stringent organizational requirements imposed upon a new party. So even filing the petitions by the February deadline would not have guaranteed access to the ballot.

In light of those restrictions, there was hardly room for any uncertainty as to the results of that system, or for any argument that Ohio was making a good faith effort to balance competing interests, or to winnow out only frivolous parties and candidates. The system made it all but impossible for any party but the Republican and Democratic parties to reach the ballot. The interest in free and open political debate, unmonopolized by those two parties, was seriously infringed. And under those circumstances, putting Ohio to the strict scrutiny test was obviously proper.

Although the point at which the strict scrutiny standard will be triggered in a case involving ballot access restrictions cannot be fixed precisely, *Williams, supra,* sheds important light on where that point is. When restrictions have the obvious effect — and perhaps the purpose as well — of allowing the two major parties to monopolize access to the voters at the ballot box or to monopolize as well the political debate during a political campaign, or to do both, then strict scrutiny is properly invoked.

Washington's system is utterly different from the Ohio system. The 1977 change which established the 1% requirement for minor parties simply eliminated the "free ride" to the general election which these parties had previously enjoyed. While they continue to have virtually guaranteed access to the electorate, that access carries them only to the primary election. If the voters overwhelmingly

reject their candidates and their message at the primary, that is the end of the line for that election.

Under Washington's system, there is, we submit, one result about which there can be no uncertainty. The 1% requirement eliminates from the general election only those parties and candidates having absolutely no chance of winning in that election. Those parties and candidates have presented their message to the voters in the primary, and been overwhelmingly rejected. Surely strict scrutiny should not apply to a system which simply says to them: "That's the end. Try again in another year." Particularly where, as here, other candidates of the party remain on the ballot in some races to carry the party's message.[2]

The SWP argues, however, that access to the primary ballot is irrelevant because no one is elected, i.e., actually put into office, in the primary. (SWP Br. 12). This argument overlooks the fact that in Washington the primary is designed to winnow out precisely those candidates and parties having no chance at all of attaining office by success in the general, or of otherwise affecting the outcome in the general. In a real sense, the voters themselves determine the "frivolous" candidate who is to be excluded from the general election. By its argument, the SWP is in effect asserting a right to appear on the general election ballot *no matter how little support it has previously garnered, and no matter how certain its defeat or lack of impact in the general election might be.* Stated another way, the SWP is claiming a right to protection from the risk and consequences of overwhelming rejection by the voters in the primary. This Court has never recognized any such right. Any certainly the strict scrutiny standard should not be applied to establish such a right.

---

[2]Eg., in 1984, the Socialist Workers' candidate for the U.S. House of Representatives position from the Seattle area remained on the ballot, as did the Amicus Libertarian Party candidates for the statewide Treasurer position, and for one U.S. Representative and one State Representative position. Supplemental citation, 1984 Washington Election Results. (JA-146). Both parties' gubernatorial candidates had failed to gather 1% support, however.

Finally, a word concerning *Jenness v. Fortson*, 403 U.S. 431 (1971), upon which we rely heavily. (See State Br. 19-21). It is undisputed that *Jenness* did not apply the strict scrutiny standard.[3] The SWP understandably contends that *Jenness* should be disregarded on the grounds that a nominating signature on a petition is much easier to obtain than a vote in a primary election. (See SWP Br. 24-25; see also ACLU Br. 38-31). Even if obtaining the signature is easier, the question is — How much easier?

The importance of this question can be seen from the table contained at page 20 of our opening brief. That table compares the Georgia 5% requirement, using 1984 Washington election figures for the race for Governor. Under the

[3]A prominent commentator, Prof. Tribe, criticizes the Court's ballot access cases, such as *Williams*, *Jenness*, *American Party*, and *Storer v. Brown*, 415 U.S. 724 (1968) for failure to articulate and consistently apply a single standard of review. Speaking of *Williams* and *Jenness*, he states that "[i]n its next major ballot access decision [*Jenness*], the Court dramatically reversed field [from *Williams*]," because in *Jenness*, "it appeared that the Court subjected the Georgia laws to only minimal scrutiny." Tribe, American Constitutional Law, 781 (1978). He also states that "[t]he most baffling aspect of *American Party* and *Storer* was the standard of review being applied," and notes that, although verbally invoked, strict scrutiny was not actually applied. Ibid., 783.

The criticism for failure to use a single standard of review, we suggest, is not well taken. In some cases, such as *Williams*, strict scrutiny may be appropriate; in others, such as *Jenness*, *American Party*, and *Storer*, it will not.

While we disagree with his suggestion that a single standard of review should apply in all these cases, Professor Tribe's discussion raises an important question as to exactly what the strict scrutiny standard means in practical application in this context. In *American Party*, for example, the Court found the Texas ballot access requirements to be "* * * reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways." 415 U.S. at 781. See also 415 U.S. at 782, n. 14. If the strict scrutiny standard involves no more than focusing upon the State's objectives to find the compelling interest, and then examining whether the access requirements are reasonably related to those objectives, we would not have difficulty with the application of such a single standard. But the SWP would have strict scrutiny mean much more than that. And we accordingly have raised the threshold question of whether strict scrutiny should be applied at all, in this broadened sense which in effect shifts the burden of proof from the challenger of the system to its defender.

Georgia system, 122,883 petition signatures would be needed to gain a place on the general election ballot. Under the Washington system, 9,140 primary votes would be needed.[4]

Is a primary vote, under the Washington system, twelve or thirteen times as difficult to obtain as a petition signature under the Georgia system? We see no reason why it should be. And the SWP (and the ACLU) offer none.

To put the matter another way: if the decision below is affirmed, Washington would have the clear alternative of adopting the system approved in *Jenness*. Is there any reason at all for concluding that the SWP, or any other minor party, would have greater success in reaching the general election under that system than they have under the present 1% requirement? We suggest that there is no such reason.

Accordingly, *Jenness* should be controlling not only the question of the standard of review to be applied, but on the ultimate disposition of this case as well.

II

BECAUSE STRICT SCRUTINY DOES NOT APPLY, THERE IS NO REQUIREMENT THAT THE STATE SHOW A COMPELLING NEED FOR THE 1% REQUIREMENT

The SWP would use its strict scrutiny argument to

[4]The table at State Br. 20 is erroneous in giving 94,449 instead of 122,883 as the total number of petition signatures required under the Georgia 5% system. See the same table, with the correct mathematical calculation, at JS 12.

It should also be noted that the ratio between the number of petition signatures required under the Georgia system and the number of primary votes required under the Washington system will vary, depending upon the percentage of registered voters who participate in a particular race. If primary participation is 50%, the ratio will be ten signature petitions for every primary vote. If primary participation is — to take an extreme — 25%, the ratio will be twenty to one. The ratio also increases as the race in question is further down the ballot with fewer voters participating.

put the State into a constitutional box. Under that argument, the State could repent of its former liberality, and require a showing of substantial support for a party to gain a place on the general election ballot, only if it can show a compelling need for the change. Since the State cannot show that, before the 1977 change which established this requirement for minor parties, such parties were so cluttering up the ballot that they seriously jeopardized the integrity of the election process, then the State is effectively locked into its old system. (SWP Br. 44).

As we have shown, this argument sinks at the first step; the strict scrutiny standard is not applicable. (It should be noted that the District Court held the Washington statute did meet the compelling interest test. Order JS App C-4, para. 14). But consider the consequences if that standard were applicable and if the State were thus locked in. In 1976, the year immediately preceding the adoption of the 1% requirement, twelve parties appeared on the general election ballot, eight of which had candidates for Governor on that ballot.[5] (See State Br. p. 8, and J.A. 27). We certainly do not contend that even this proliferation of parties was shaking the process apart. Again, how many is "too many" cannot be determined by anyone with certainty. Yet that proliferation may well have caused the Washington legislature to ask whether some of these candidacies and parties might not be "frivolous," however defined, and whether their inclusion on the general election ballot might not be "wasteful and confusing." See *Anderson, supra,* 460 U.S. 780 at 715, n. 9 (1983).

In fact, the legislature asked this question, thought there was a problem, and tried to do something about it by adoption of the 1% requirement. See Memorandum to the Conference Committee on ESSB 2032, attached hereto as

[5]In the 1976 race for Governor, four of the minor parties, including the Social Workers, had less than a third of one percent of the total vote, and the other two minor parties had less than one percent. (J.A. 27).

Appendix A.[6] That memorandum summarized the reasons for the various proposals for changing the election laws, and suggested a compromise between the Senate and House proposals — a compromise that was essentially adopted by the committee and the Legislature. As that memorandum shows, the drafters of the compromise proposal knew that the 1% requirement embodied therein would have an effect on minor party candidates, but, on the basis of their analysis of 1976 election data, believed that the effect would be reasonable and that the proposal would "provide existing minor political parties with a reasonable opportunity to qualify their candidates for the general election and present their platforms in a responsible manner." (App. A, p. 2).

Yet the SWP's strict scrutiny argument would prohibit the Legislature from addressing the problem which it perceived, at least in the absence of some absolute necessity. And thus, by reason of its inability to show a "compelling need," Washington would be prevented from exercising a right enjoyed by every other State, viz., the right to require a substantial showing of support in order to eliminate frivolous candidacies and the wastefulness and potential confusion which they would entail.[7]

[6]This memorandum is found at pages 12 and 13 of Exhibit B to the Defendant's Reply to Plaintiff's Motion for Summary Judgment, CR-23, and is referred to in the Court of Appeals Decision. (JS A-4).

[7]The Legislative history indicates that one particular party, the OWL, or "Out With Logic" party may have been a factor in the Legislature's re-examining the previous system. See the exchange found at 1977 House Journal 696, Washington State Legislature.

> Mr. Nelson (Dick) yielded to question by Mr. Deccio. Mr. Deccio: "Representative Nelson, you used the term 'frivolous minor parties.' Would you give us an example of what a frivolous minor party is?"
>
> Mr. Nelson (Dick): "Well, I think, to give you a good definition, I think a frivolous minor party is a party that really doesn't have a platform and isn't seriously proposing solutions to the problems of this state and this nation. There was at least one on the ballot I think that turned the election process into a comedy. That

III

THE RESULTS UNDER THE 1% REQUIREMENT DO NOT JUSTIFY INVALIDATING THAT REQUIREMENT. RATHER, THOSE RESULTS SHOW THAT MINOR PARTIES AND THEIR CANDIDATES CAN MEET THAT REQUIREMENT WITH REASONABLE DILIGENCE.

In evaluating the impact of the 1% requirement, it is useful to distinguish three groups of candidates. The first consists of minor party candidates running for statewide office. The second consists of minor party candidates running for non-statewide office. And the third consists of independent candidates running for statewide office. All three groups were subject to the 1% requirement and to the same time frames for each step in the election process. Yet the Court below expressly rejected the experience of the third group, independents running for statewide office, as irrelevant (JS A-4); and it tacitly disregarded the experience of the second, minor party candidates running for non-statewide office. The SWP would have this Court similarly treat the experience of those two groups as irrelevant. And for good reason; for that experience shows where the SWP's problem really lies.

The success rates for the first and second groups can

I would call a frivolous minor party. They appear to be taking on the proportions of a major party and unless maybe some of us get to work they might present a bigger problem."

The reference to a party that "turned the election process into a comedy" is to the OWL party. For examples of such "comedy," see the statements of OWL party candidates contained in the 1976 Official Voters Pamphlet, pp. 16, 19, 20, 21 and 23. This pamphlet is printed by the Secretary of State and mailed to all Washington voters at state expense.

Representative Nelson's remarks are quoted, but only in part, and thus misleadingly, by the SWP (SWP Br. p. 41) and the ACLU (ACLU Br. p. 19).

The antics of the OWL Party, however, were not the primary source of concern which prompted the adoption of the change. The legal and practical administrative concerns are set forth at J.A. 77, 78, and in the memorandum attached hereto as Appendix A.

be determined fairly closely, though not precisely. From Table II of our opening brief (State Br. 8), it will be seen that 47 minor party candidates entered a September primary in the years subsequent to 1977. These candidates exclude presidential candidates, but include candidates for both statewide and non-statewide office. The table also excludes the special 1983 election for U.S. Senator. By adding in that election, the total number of candidates becomes 48.

Of those 48, 37 went on to the general election, as also seen from that table. This leaves eleven candidates who failed to meet the 1% requirement. Although our table does not identify these candidates by statewide or non-statewide office, Table I of the SWP brief is helpful here in making that identification. (SWP Br. 5, 6). That table shows seven minor party candidates who failed to go on to the general, all in either a U.S. Senate race or the race for Governor. Presumably, the remaining four failures were either minor party candidates for non-statewide office, candidates for other unidentified statewide offices, or a combination of both.

Factoring in the one minor party candidate who did go on to the general, the success rate for the first group, minor party candidates for statewide office, is somewhere between one out of eight and one out of twelve. But, the success rate for the second group, minor party candidates for non-statewide office, would be somewhere between thirty-six out of thirty-six — 100% — and thirty-six out of forty.[8]

The success rate for the third group, independents running for statewide office, can be calculated precisely. Four out of five went on to the general. (See J.A. pp. 135, 136, 146).[9]

---

[8]Again, the precise success rate for both groups will be dependent upon the actual distribution of the four unaccounted failures to the one group or the other.

[9]The suggestion of the Court below that only three independents went on to the general election is in error. (JS A-4).

What accounts for the very high success rate for the second and third groups, and the very low success rate for the first? Although one cannot answer this with certainty, some probable explanations are obvious. As the SWP correctly states: "Their [minor parties;] base is frequently concentrated in one or a few areas, most often urban." (SWP Br. 33). The SWP, for example, may well have its base of support, such as it is, primarily in the Seattle-Tacoma industrial area, rather than the agricultural areas of eastern Washington. Additionally, the minor parties may simply not work as hard on statewide races as they do on non-statewide races. They must either expand their base of support geographically or exploit that local base more intensely. That the first alternative is quite possible is clear from the success of statewide independent candidates, the third group. And that the second alternative is also quite possible is clear from the success of minor party candidates in non-statewide elections, the second group.

Surely the State's uniform requirement for all three groups must not be tossed aside simply because the first group pursues neither alternative. Indeed, the major vice, as a practical matter, in the decision below is that it makes a shambles of a State's effort to have a single uniform system, and requires instead that the State tailor its system for the supposed needs of the least diligent and least successful group.

We have examined the experience of the second and third groups in more detail than in our opening brief because of the SWP's vigorous assertion that this experience is irrelevant. (SWP Br. 33-40). Indeed, the SWP disparages our contention that the State should be free to adopt a single uniform standard, to be justified not by looking at the experience of minor parties in statewide races alone, but by looking at the experience of minor parties in non-statewide races and of independents in statewide races as well. The SWP calls our contention a "* * * superficially attractive but empty argument of bare 'equal treatment'." (SWP Br. 40).

We would suggest that this disparagement, and the SWP's efforts to have the Court ignore the experience of these other groups, are no more than an effort to avoid focusing on the most probable reasons for its lack of success. Further, the SWP seems to be suggesting that it would not only be permissible, but perhaps even constitutionally required, that Washington give disparate treatment to one or more of the three groups which we have discussed. (SWP Br. 40). A similar suggestion seems to be embodied in the SWP's complaint that the 1977 change put minor parties onto the more crowded primary election ballot and removed their almost guaranteed access to the less crowded general election ballot. The complaint, in effect, is that its candidates are deprived of a constitutional right by having to compete on the same terms as every other primary candidate.[10]

In answer, we would only note the obvious. The independent statewide candidates with whom minor party candidates are competing succeed where they fail. To require a State legislature to try to even things out, by jettisoning a single uniform standard and enacting instead some sort of political handicapping system for each of the various

---

[10]During the period between the end of the Depression and the 1976 election, a period in which minor parties had direct access to the general election, and thus did not have to face the competition of which the SWP here complains, their candidates do not seem to have been appreciably more successful in eliciting voter support in the general than they are now in the primary. See J.A. 25-27, which gives the vote for each candidate for Governor from 1896 through 1980. From the 1940 election through the 1976 election, twenty minor party candidates ran for Governor, and only two gained 1% or more of the total vote. During the period from 1896 through 1936, many more minor party candidates gained over 1%.

The listing of the gubernatorial vote to which we refer is also appended to the *amicus* brief of the ACLU and National Lawyers Guild. Referring to that listing, the brief states: "Prior to 1977, when minor parties routinely appeared on the general election ballot, they quite often obtained more, often much more, than one percent of the votes." (ACLU Br. 32). The statement is correct only with respect to the period before 1940; for the subsequent period, it is absolutely incorrect.

groups, is fraught with obvious practical — and constitutional — dangers.

CONCLUSION

For the reasons given above and in our opening brief, the decision below should be reversed.

Respectfully submitted,

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APPENDIX A

SECRETARY OF STATE

June 4, 1977

MEMORANDUM

TO: Senators C. W. Beck, *Gary Grant*, and Lois North; and Representatives Otto Amen, John Hawkins, and Dick Nelson

FROM: Duane C. Woods and Donald F. Whiting

RE: Conference Committee on ESSB 2032

From our discussions with members of the conference committee and the staff of both the House and Senate Committees on Elections about questions which were raised during the first meeting of the conference committee on ESSB 2032 (Minor Party Nominating Procedures), we feel that, despite the mechanical differences in the two approaches, both bills have the same basic objectives: to discourage frivolous use of the minor party nominating procedures and to eliminate the present exclusion of persons nominating minor party candidates from voting on unrelated items on the state primary election ballot (this subject is still in litigation in Federal District Court). The essential difference between the two versions of the bill — the direct nomination of minor party candidates by convention vs. the qualification of the party by petition and nomination of the candidates in the primary — arises out of a secondary concern about how much control minor parties should have over the selection of candidates to represent their viewpoints and the importance of exposure of their party platforms through the medium of the Voters' and Candidates' Pamphlet.

We feel that all of these considerations can be accommodated successfully by combining some of the elements of each proposal. We offer the attached proposal as a sug-

gestion of how to retain the essential ingredients of each approach in a single bill which still meets the common objectives of the House and Senate and would provide existing minor political parties with a reasonable opportunity to qualify their candidates for the general election and present their platforms to the electorate in a responsible manner. In the attached proposal, we suggest retaining the nominating convention as proposed in sections 1-4 of the House version of the bill with the exception of lowering the minimum number of registered voters required for nominations from twenty-five to ten (this will reduce the likelihood of multiple, regional conventions while retaining the principle that each nomination should be an expression of genuine support from the voters of the jurisdiction for which the nomination is made). The candidates nominated at the minor party convention would appear on the primary election ballot as provided in section 8-12 of the Senate version of the bill with the exception that each individual candidate must receive at least one percent of the vote cast for that position in the primary in order to appear on the general election ballot.

Based on the returns of the 1976 state general elections, eight of the twelve parties which nominated candidates in 1976 would have qualified under this suggested compromise (the same number as under the House version of the original bill) and all of these parties would have qualified candidates for the general election (fifty of the sixty-five non-presidential candidates would have survived the primary and had statements in the Candidates' Pamphlet).

We are offering this suggestion for discussion by the conference committee at its subsequent meetings. We will be happy to discuss the suggested draft with members of the committee or answer any questions you may have at any time.